ELECTRONICALLY FILED DEC 23, 2016 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

No. 16-0203

STATE OF IOWA,
Appellee,

vs.

CHRISTOPHER JEPSEN,
Appellant

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR CRAWFORD COUNTY, IOWA
THE HONORABLE STEVEN J. ANDREASEN, DISTRICT JUDGE

APPELLANT'S REPLY BRIEF

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ARGUMENT

JEPSEN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE HIS COUNSEL BEFORE THE DISTRICT COUR FAILED TO ARGUE THAT JEPSEN WAS ENTITLED UNDER THE DOUBLE JEOPARDY CLAUSE TO CREDIT AGAINST HIS SECOND SENTENCE OF INCARCERATION FOR TIME SPENT ON PROBATION UNDER HIS FIRST SENTENCE.

The State, in its responsive brief, argues that the Double Jeopardy Clause does not require that that Jepsen receive credit against his corrected sentence of incarceration for all of the nearly four years that he spent on probation under the illegal sentence. This argument fails, for the following reasons.

The State, in its brief, writes that here "there is no Double Jeopardy problem." *See* red Br. at 9. The State supports this contention by citing a number of cases for the proposition that "[a]fter a defendant has *completed* a sentence, a legitimate expectation in the finality of the sentence arises and double jeopardy principles prevent reformation of the original, albeit illegal, completed sentence." *See* Red Br. at 9, citing *State v. Houston*, No. 09-1623, 2010 WL 5050564, at *3 (Iowa Ct. App. Dec. 8, 2010); *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *People vi Williams*, 925 N.E.2d 878, 888 (N.Y. 2010); *United States v. Rourke*, 984 F.2d 1063, 1066 (10th Cir. 1992); *State v. Bloomer*, 909 N.E.2d 1254, 1261 (Ohio 2009).

But none of those cases are relevant here at all. Rather, each of these cases deals with when a defendant's legitimate expectation of finality in a sentence prevents a court from resentencing the defendant. These cases would be relevant if Jepsen were arguing that the district court here was precluded by the Double Jeopardy Clause from resentencing him at all. But that is not Jepsen's argument here.

Rather, Jepsen's argument is based entirely on the rule announced in *North Carolina v. Pearce*, 395 U.S. 711 (1969), and the expansions of that rule that are demanded by its logic. Notably, the phrase "legitimate expectation of finality" does not appear even once in *Pearce*, since that concept has no relevance to *Pearce*'s holding. Indeed, the analysis that the State relies on, that the analysis from *Pearce* that is relevant here, are entirely separate: where a defendant has a legitimate expectation of finality in his sentence, he cannot be resentenced, and thus the *Pearce* rule regarding credit at resentencing for time served on the vacated sentence has no relevance; and likewise, where a defendant has been resentenced and is demanding credit under *Pearce*, he necessarily had no legitimate expectation of finality in his sentence, or he would not have been subject to resentencing at all.

The State attempts to counter Jepsen's reliance on *Pearce*, but its attempts to do so fail.

The State cites *People v. Whitfield*, 888 N.E.2d 1166, 1174-77 (Ill. 2007), for the proposition that *Pearce* does not apply to cases like Jepsen's. *See* Red Br. at 11. But the State fails to mention that even the court in *Whitfield* recognized that it is in the minority on this issue, citing the contrary decisions in *United States v. Martin*, 363 F.3d 25, 37 (1st. Cir. 2004); *United States v. Carpenter*, 320 F.3d 334, 345 n.10 (2d. Cir. 2003); and *United States v. McMillen*, 917 F.2d 773, 777 (3rd. Cir. 1990). *See Whitfield*, 888 N.E.2d at 1175.

Nor does the State, in its brief, compare the reasoning of the case it likes with the cases the State does not like, to attempt to determine which is most persuasive. Doing so reveals that *Whitfield*'s reasoning is not consistent with Iowa law, or for that matter with federal law. In particular, the *Whitfield* court describes probation as "a form of clemency" and a "privilege." *Whitfield*, 888 N.E.2d at 1176. The *Whitfield* court even stated that "[i]t is clear that probation is not a 'punishment' in the same sense as imprisonment is a punishment." *Id.* Only by such reasoning – holding, in essence, that probation is not a punishment at all – could the *Whitfield* court conclude that "a defendant sentenced to probation, and then sentenced to

imprisonment for the same offense, is not subject to an unconstitutional second punishment for double jeopardy purposes and, therefore, is not entitled to credit for time spent on probation." *Id.*

This reasoning is not consistent with Iowa law. Indeed, as is recognized by one of the very cases that the State cites in its brief, "[p]robation under 903B constitutes a form of punishment," for purposes of the Double Jeopardy Clause's "protect[ion] against multiple punishments for the same offense." *State v. Houston*, No. 09-1623, 2010 WL 5050564, at *6 (Iowa Ct. App. Dec. 8, 2010) (citing *State v. Allen*, 601 N.W.2d 689, 690 (Iowa 1999); *State v. Lanthrop*, 781 N.W.2d 288, 290 (Iowa 2010)). There is no apparent reason, and the State has offered none, why the probation sentence imposed on Jepsen was any less a punishment then probation imposed under chapter 903B and discussed in *Houston*.

Similarly, as Jepsen explained in his opening brief, federal courts have recognized that probation is a punishment for double jeopardy purposes. *See, e.g.*, *Martin*, 363 F.3d at 37 (citing *Korematsu v. United States*, 319 U.S. 432, 435 (1943)).

The State's other arguments likewise fail. The State writes that Jepsen's argument, in his opening brief, that anything other than a one-to-one credit, day for day, of the time he spent on probation against the time he has been

sentenced to spend in prison, is too arbitrary, somehow undermines Jepsen's argument. *See* Red Br. at 12-13. But the State's argument on this point suffers from the same fatal flaw as the arguments discussed above: it is based entirely on the State erroneous notion that probation does not constitute punishment at all. *See, e.g.*, Red Br. at 12-13 ("[T]he Constitution does not require that [Jepsen] receive even a single day's credit against his term of incarceration from the time he spent effectively free on probation."). Rather, the rule of *Pearce* and its state and federal progeny is clear that punishment actually endured must be fully credited, in order to comply with the Double Jeopardy Clause, and Iowa law is clear that probation is punishment.

The State cites *Trecker v. State*, 320 N.W.2d 594, 595 (Iowa 1982), in support of its claim that a defendant need not be credited for time spent on probation, *see* Red Br. at 13, but *Trecker* does not even mention the double jeopardy clause – indeed, the *Trecker* Court expressly noted that "no constitutional argument is raised in this case." *Id.* at 595. Thus, *Trecker* has no relevance here.

Nor does the State's discussion of *Anderson* and the Iowa Code. *See* Red Br. at 13-14. The State writes that "an Iowa defendant cannot receive sentencing credit for any time served on probation where 'no provision

specifically authorized such a sentencing credit." *See* Red Br. at 13 (citing *Anderson v. State*, 801 N.W.2d 1, 4 (Iowa 2011)). But, of course, the Double Jeopardy Clause controls over the Iowa Code. If the Iowa Code does not provide for the allowance of credit for time served that is demanded by the Double Jeopardy Clause, or prohibits the allowance of such credit, then the relevant portion of the Iowa Code is unconstitutional. In any event, this Court plainly cannot rely on the Iowa Code as a ground for denying Jepsen credit for time served that he is entitled to under the Double Jeopardy Clause.

CONCLUSION

For the foregoing reasons, and the reasons set forth in his opening brief, Appellant Christopher Jepsen respectfully requests that this Court vacate his sentence, and remand for further calculation of the credit against his sentence of incarceration that Jepsen is entitled to for time her previously served on probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies a copy of this Appellant's Reply Brief was served on the 23rd day of December, 2016, upon the following persons, by EDMS and United States Mail, respectively:

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The undersigned further certifies that the Appellant's Reply Brief was sent to the Clerk of the Supreme Court, Iowa Judicial Branch, 1111 East Court Avenue, Des Moines, Iowa 50319, on the 23rd day of December, 2016, by EDMS.

_/s/ Zachary S. Hindman__________

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Iowa R. App. P. 6.903 (1)(g)(1) because this brief contains 1,606 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14.

Dated this 23rd day of December, 2016.

_/s/ Zachary S. Hindman___________